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Nos. 07-588, 07-589, 07-597

IN THE
Supreme Court of the United States

ENTERGY CORPORATION,
Petitioner,
v.
ENVIRONMENTAL PROTECTION AGENCY, *et al.*,
Respondents.

PSEG FOSSIL LLC, *et al.*,
Petitioners,
v.
RIVERKEEPER, INC., *et al.*,
Respondents.

UTILITY WATER GROUP,
Petitioner,
v.
RIVERKEEPER, INC., *et al.*,
Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF *AMICI CURIAE* AMERICAN CHEMISTRY COUNCIL, AMERICAN FOREST & PAPER ASSOCIATION, AMERICAN IRON AND STEEL INSTITUTE, CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AND NATIONAL ASSOCIATION OF MANUFACTURERS IN SUPPORT OF PETITIONERS

RUSSELL S. FRYE
Counsel of Record
FRYELAW PLLC
1101 30th Street, N.W. Suite 220
Washington, DC 20007-3769
(202) 572-8267

Counsel for Amici Curiae

(Additional Counsel Listed on Signature Page)

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae American Chemistry Council, American Forest & Paper Association, American Iron and Steel Institute, Chamber of Commerce of the United States of America, and National Association of Manufacturers are trade associations and business organizations that represent the interests of business and industry in the reasonable implementation of requirements for cooling water intake structures under Clean Water Act section 316(b), 33 U.S.C. § 1326(b).

These organizations represent a broad spectrum of U.S. business and industry. Their members include companies that withdraw water from rivers, lakes, estuaries, and the territorial seas for use in their facilities for cooling purposes. These members may be affected directly by the Second Circuit's incorrect interpretation in the decision below of the requirements of Clean Water Act section 316(b). *Amici* also represent businesses that are large consumers of electric power, which can expect increased operating costs if less-flexible, more-expensive requirements under section 316(b) mandated by the decision below are imposed on electric utilities from which those businesses purchase their electric power. Also, to the extent that the Second Circuit's view of the permissible consideration of costs

[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. The only person other than these *amici curiae* or their members that made a monetary contribution to its preparation or submission is the American Petroleum Institute.

and benefits in setting effluent limitations under the Clean Water Act is followed by EPA or individual permit writers in imposing effluent limitations on point-source discharges of wastewater, *amici*'s members will suffer additional adverse effects as a result of the decision below.

For the most part, *amici*'s members do not operate facilities subject to the Environmental Protection Agency's ("EPA's") regulation establishing requirements for cooling water intake structures at Phase II existing facilities, 69 Fed. Reg. 41,575 (July 9, 2004) (Pet. App. 122a-593a)[2] (hereinafter the "Phase II Rule"), which is the subject of the decision below. That is because the Phase II Rule regulates only existing facilities whose primary activity is the generation and transmission or sale of electricity. *See* 40 C.F.R. §§ 125.90, 125.91(a) (2007). But existing industrial and commercial facilities (as well as smaller electricity generation plants) that have cooling water intake structures, which EPA has designated "Phase III facilities," are also subject to requirements implementing Clean Water Act ("CWA") section 316(b), established by permit writers on a case-by-case, "best professional judgment," basis. 40 C.F.R. § 125.90(b) (2007); 71 Fed. Reg. 35,006, 35,008 (June 16, 2006). Thus, *amici*'s members will be adversely affected if those permit writers follow the Second Circuit's restrictive view of the permissible consideration of costs and benefits in establishing requirements under CWA section 316(b).

[2] Citations to the Pet. App. refer to the appendix filed with the petition for writ of *certiorari* in No. 07-588.

SUMMARY OF ARGUMENT

The Second Circuit erroneously concluded that EPA effectively is precluded from considering the relationship of costs to benefits when establishing requirements for cooling water intake structures under Clean Water Act section 316(b). This conclusion, which is at odds with long-standing EPA practice and decisions of other courts, would produce serious adverse impacts for many more facilities than just large electric generating plants. The Second Circuit's interpretation of section 316(b) will no doubt be considered, and perhaps followed, in applying section 316(b) to a large universe of industrial and commercial facilities that withdraw water for cooling purposes. Moreover, because the wide diversity among those industrial and commercial facilities makes flexibility in applying section 316(b) even more important to avoid imposing excessively costly requirements for little benefit, the extreme, rigid view of section 316(b) in the Second Circuit's decision has the potential to have a proportionately more severe effect on those facilities than on the electric utilities represented by petitioners.

Additionally, since the Second Circuit based its restrictive view of EPA's discretion in establishing requirements for cooling water intake structures under CWA section 316(b) on its interpretation of CWA section 301 and section 304 requirements for limitations on wastewater discharges, 33 U.S.C. §§ 1311 and 1314, the adverse effects of the decision below may be felt much more broadly than by just those facilities that operate cooling water intake structures. The Second Circuit's view that EPA cannot reject a wastewater treatment technology option that has far greater costs but only

minimal additional pollution reduction benefits would, if applied to the thousands of facilities with wastewater discharges, impose serious financial burdens on society for little benefit.

These unproductive, rigid technology-selection requirements the Second Circuit found in the Clean Water Act are a product of improper statutory interpretation. The Second Circuit failed to give deference to EPA's long-standing interpretation of CWA section 316(b). It based its own interpretation on a selective analysis of provisions of the Clean Water Act addressing effluent limitations for wastewater discharges under CWA sections 301 and 304, an analysis that also ignored essential differences in wording and purpose between those sections and CWA section 316(b).

Moreover, the Second Circuit relied on an unduly restrictive view even of those portions of CWA sections 301 and 304 that it did focus on. Its conclusion that EPA lacks discretion to give almost any consideration to the reasonableness of the relationship between the cost of wastewater control technology options and the pollution reduction benefits those options produce is contrary to the plain language of CWA sections 301 and 304 and to virtually every other appellate decision interpreting those sections.

ARGUMENT

I. The Second Circuit's Interpretation of Section 316(b) Could Impose Costly, Unnecessary Requirements on Cooling Water Intake Structures at Many More Facilities than Just Electric Utilities.

The Phase II Rule that is the subject of the decision below affects hundreds of electric utility generating plants. If EPA is forced by the decision below to impose requirements based on the most effective technology for cooling water intake structures that the utility sector can financially bear, that could impose billions of dollars of compliance costs on the utility sector. *See* 69 Fed. Reg. at 41,605 (Pet. App. 255a-257a). Much of those costs can be expected to be passed on to purchasers of electricity, such as those represented by the *amici*. *Amici* would also be adversely affected by the power plant downtime and loss of generating capacity predicted to occur. *See* 69 Fed. Reg. at 41,605 (Pet. App. 257a-259a).

The impact of the Second Circuit's decision may be even wider, however, because of its potential effect on the implementation of CWA section 316(b) at the Phase III industrial and commercial facilities and small utilities. Under 40 C.F.R. § 125.90(b) (2007), Phase III facilities and other facilities for which EPA has not promulgated nationwide categorical standards "must meet requirements under section 316(b) of the CWA determined by the [state or EPA permit writer] on a

case-by-case, best professional judgment (BPJ) basis."[3] *See also* 71 Fed. Reg. at 35,008.

In the decision below, the Second Circuit has interpreted CWA section 316(b) as dictating that, at least when developing national standards for a category of sources, EPA must choose the most effective technology for minimizing the impact of cooling water intake structures that the category as a whole "can reasonably bear." *Riverkeeper, Inc. v. U.S. EPA*, 475 F.3d 83, 99-100 (2nd Cir. 2007) (Pet. App. 26a-27a). EPA may not consider whether the costs of that technology significantly outweigh the benefits, even if the costs are wholly disproportionate to the benefits, but may only consider relative costs when two technologies "produce essentially the same benefits." Pet. App. 28a. In fact, the decision suggests that, faced with a technology that costs 50 percent more but assures that one additional fish will be saved from impingement on or entrainment in the cooling water intake structure, EPA may be obligated to impose requirements based on the more costly technology. *Id.* at 26a-28a (EPA could not reject, "on cost considerations," a technology that "saves" at least 102 fish if electric utilities could afford it, even if it is 50 percent more expensive than a technology "saving" 99-101 fish).

Although the decision below was in the context of national, categorical requirements for Phase II facilities and does not apply directly to case-by-case, "best

[3] While other portions of the Phase II Rule have been suspended by EPA, that section remains in effect. 72 Fed. Reg. 37,107, 37,108 (July 9, 2007).

professional judgment" permit requirements for intake structures at the remaining universe of existing facilities (Phase III facilities), permit writers now must decide, in considering whether to impose additional requirements for cooling water intake structures at individual Phase III facilities, whether to adopt the flexible interpretation of section 316(b)'s requirements followed by EPA and other courts, or the extreme view of the limits of EPA's discretion under CWA section 316(b) provided by the Second Circuit in the decision below.

If the permit writers choose to follow the Second Circuit's view that "best technology available for minimizing environmental impact" means the technology that produces the least impingement and entrainment of aquatic organisms, no matter how high the cost in comparison to the incremental reduction of impingement and entrainment, then the many Phase III facilities represented by *amici* and others will be adversely affected, and society will suffer large costs with little incremental benefit.

This is not just a theoretical concern. In looking at the large electric generating plants that were the subject of the Phase II Rule, EPA identified a suite of technologies that, when used in the best configuration for local conditions, are capable of controlling impingement and entrainment at cooling water intake structures to an extent *approaching that of closed-cycle cooling* (the available technology EPA found to have the best performance in reducing entrainment and impingement mortality), but *at one-ninth the cost*. 69 Fed. Reg. at 41,605-606, 41,650 (Pet. App. 255a-257a,

260a-261a, 450a-4452a). The Second Circuit apparently would have EPA issue regulations requiring electric utilities to install controls with performance *identical* to closed-cycle cooling, which would impose billions of dollars of additional costs on electric utilities, for only a small increment of impingement and entrainment reduction.

Although Phase III facilities collectively only withdraw about 10 percent as much cooling water as the large electric utility plants covered by Phase II, 71 Fed. Reg. at 35,017, there are thousands of industrial, commercial, and institutional facilities that use cooling water. *See* 69 Fed. Reg. 68,444, 68,455 n.4 (Nov. 24, 2004) (almost 700 Phase III facilities have intake structures withdrawing 2 million gallons or more per day). If only large Phase III facilities (those withdrawing over 50 million gallons a day for cooling, of which there are about 150) were subject to regulations imposing stringent requirements for cooling water intake structures similar to those the Phase II Rule imposed on large electric utilities, EPA estimates that compliance costs would be on the order of $40 million per year. 71 Fed. Reg. at 35,031-32. Because of the nature of Phase III facilities, EPA estimates that such expenditures would produce only about one-fourth of the benefit per dollar spent as the Phase II Rule.[4]

[4] *Id.* at 35,018. Existing industrial facilities present a wider range of locational and process constraints for application of uniform technology requirements than do existing utility generating stations. *Cf.* 69 Fed. Reg. at 41,605-606, 41,608 (Pet. App. 256a-259a, 270a-271a). Industrial facilities are more likely to be located in close proximity to other properties, and it (Cont'd)

Industrial facilities regulated under Phase III on average withdraw far less cooling water than the large utilities covered by Phase II. Even on a flow-weighted basis, however, EPA estimated that the number of organisms impinged and entrained by Phase III facilities is approximately one third the number of organisms impinged and entrained by Phase II facilities withdrawing the same volume. 69 Fed. Reg. at 68,463 col. 3. This reflects in part the fact that the smaller Phase III facilities are less likely to withdraw a significant portion of the source water body, and a smaller percentage of the overall cooling water flow withdrawn by Phase III facilities comes from more-sensitive tidal river, estuary, and ocean environments than for Phase II facilities. *See id.* col. 1. If, as the Second Circuit concluded, section 316(b) requires even more stringent provisions than those imposed by the Phase II Rule on electric utilities, then applying that same approach to the remainder of existing facilities (Phase III facilities) would impose even more-disproportionate costs with even lower cost-effectiveness.

The Second Circuit decision at issue here will, at a minimum, create uncertainty and confusion about what factors may be considered by permit writers in the

(Cont'd)

is not unusual for them to have been operated and expanded over half a century or more. Installation of certain technologies to reduce impingement and entrainment mortality may be physically impossible due to site constraints. In addition, the generally smaller scale of cooling water usage at industrial facilities (*compare* 67 Fed. Reg. 17,121, 17,130, 17,135 (April 9, 2002) *with* 69 Fed. Reg. at 68,455-56 and 68,502) can make some technologies impracticably costly and cost-ineffective.

application of section 316(b) on a case-by-case basis to the many facilities with cooling water intake structures outside of the electric utility sector. Additionally, if permit writers choose or are required to use the Second Circuit's very restrictive view of section 316(b), the Second Circuit's decision will impose a large financial burden on society for measures at these additional facilities that are not cost-effective and may have incremental costs far greater than their benefits.[5]

[5] A group of environmental advocacy groups with essentially the same members as respondents in the instant case are pursuing litigation, currently stayed, seeking to overturn EPA's decision to continue to regulate Phase III existing facilities on a case-by-case basis. *ConocoPhillips, et al. v. EPA*, Fifth Cir. No. 06-60662; *Riverkeeper, et al. v. EPA*, S. D. N.Y. No. 1:06-cv-12987-PKC. If that litigation was successful, then the impact of the Second Circuit's decision—which requires that nationwide categorical section 316(b) requirements be based on "the optimally best performing" facilities in the country, Pet. App. 26a, rather than on technologies that can be applied to an individual facility—could be even greater. In the Phase III rulemaking, EPA has already found that imposing a uniform categorical set of requirements for all Phase III existing facilities would, given the highly diverse nature of such facilities and their setting, impose costs on the sector wholly disproportionate to the benefits. 71 Fed. Reg. at 35,017-18.

II. The Second Circuit's Rejection of Cost and Benefit Considerations for Implementing Section 316(b) Is Not Compelled by the Statute.

A. The Second Circuit Improperly Ignored the Statutory Language and EPA's Reasonable Interpretation of It.

The rigid, restrictive view of CWA section 316(b) offered by the Second Circuit, with its great potential for imposition of costly and unnecessary regulatory burdens, is not compelled by the only reasonable interpretation of the statute. To the contrary, the Second Circuit rejected EPA's permissible interpretation and substituted its own reading of the statute: an arbitrary reading that ignores critical provisions of the statutory language.

As petitioners have explained in their briefs, the Second Circuit's conclusion that EPA is so constrained in implementing CWA section 316(b) is contrary to EPA's consistent interpretation of the statute since the 1970s and is contrary to the interpretation adopted by other courts. *See*, *e.g.*, merits brief for the Federal Parties at 27-28. The opinion below acknowledged that "section 316(b) does not itself set forth or cross-reference another statutory provision enumerating the specific factors that the EPA must consider in determining BTA." Pet. App. 20a. Since section 316(b) says nothing specific about the weight that EPA should accord costs and benefits in determining the "best technology available for minimizing adverse environmental impact," the Second Circuit should have deferred to EPA's long-standing, reasonable

interpretation of section 316(b). *See, e.g., Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-45 (1984); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132-33 (2000); *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994); *Bankamerica Corp. v. United States*, 462 U.S. 122, 130-32 (1983). But instead of determining whether EPA's interpretation is a permissible one, the Second Circuit unabashedly substituted its own view of how the statutory language is "more properly understood." Pet. App. 28a.

Beyond that lack of deference to EPA's interpretation, though, the Second Circuit's interpretation simply fails to reflect the language of the Clean Water Act. First, the Second Circuit effectively gives no consideration to what Congress intended by the terms "minimize" and "adverse environmental impact" in section 316(b). In the Second Circuit's view, a technology that "saves" 102 fish minimizes adverse environmental impacts, while one that "saves" 101 fish does not—without consideration of whether the cooling water intake structure as-is causes adverse environmental impact, or whether one less fish impinged on or entrained through the cooling water intake structure will have any impact at all on the environment, i.e., the health of the aquatic community in the source water body. *See* p. 6, *supra*.

In the absence of any reason to the contrary, words in statutes should be given their ordinary, dictionary meaning. *See, e.g., MCI Telecomms. Corp. v. AT&T*, 512 U.S. 218, 225-28 (1994). In common usage "minimize" does not mean "eliminate," but rather incorporates the

notion of reducing to the extent practicable. *See* American Heritage Dictionary of the English Language, Fourth Ed. (2000), usage note for "minimal." "Adverse" means "harmful or unfavorable." *Id.* The Second Circuit's view of what is required by section 316(b)—elimination of any impact if affordable technology is available to do so—is inconsistent with the ordinary meanings of those terms. Moreover, it effectively reads "adverse" out of the statute, violating the basic principle of statutory interpretation that statutory language should not be interpreted so that one or more of the words Congress used become "mere surplusage." *See, e.g., TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001).

Looking beyond the language of section 316(b) itself (or, more accurately, overlooking it), the Second Circuit concluded that section 316(b)'s reference to point sources subject to standards issued under CWA section 301 necessarily incorporated into section 316(b) the criteria EPA must apply in developing effluent limitations guidelines for point source discharges under Clean Water Act sections 301 and 304. *See* Pet. App. 20a, 23a. Moreover, as explained below, the Second Circuit, without explanation, decided that the relevant criteria to be incorporated into section 316(b) are those that applied post-1984 to discharges of toxic pollutants.[6]

[6] Case law discussing the Best Available Technology level of control for wastewater discharges sometimes refers to "the 1983 standards," "the 1984 standards," or "the 1987 standards." The Federal Water Pollution Control Act of 1972 originally required compliance with limitations based on the Best Available Technology by July 1, 1983. The Clean Water Act of (Cont'd)

Even then, the Second Circuit's extrapolation of requirements for intake structures relied on its incorrect assertion that EPA has virtually no discretion to consider the relationship between costs and benefits when setting Best Available Technology ("BAT") effluent limitations for toxic pollutants.

B. Imposing the Factors for Establishing Effluent Limitations on the Cooling Water Intake Section of the CWA Is Unjustified.

The Second Circuit's conclusion that section 316(b) incorporates criteria for decision-making identical to those for effluent guidelines under sections 301 and 304 cannot be squared with the facts that: (1) section 316(b) does not say anything about incorporating the criteria used to set effluent limitations, (2) section 316(b) contains distinctly different language from sections 301 and 304, and (3) the two sets of provisions have different goals. The technology-based effluent limitations in sections 301 and 304 (and section 306, for new sources) were Congress' response to difficulties that had been experienced in trying to limit wastewater discharges based solely on predictions of what was necessary to assure a healthy population of aquatic life in the receiving waters. *See EPA v. California, ex rel. State Water Res. Control Bd.*, 426 U.S. 200, 203-205

(Cont'd)

1977 changed that deadline to July 1, 1984 for most industry categories, with compliance at the latest required by July 1, 1987. *See EPA v. Nat'l Crushed Stone Ass'n*, 449 U.S. 64, 70 n.9 (1980). (It also substituted Best Conventional Technology for Best Available Technology for "conventional" pollutants. *Id.*)

(1976). Congress chose, as one of the centerpieces of the new legislation adopted in 1972, an approach that set effluent limitations based initially solely on the capability of available wastewater treatment technology, without regard to whether that level of treatment was necessary to meet water quality standards in the receiving waters. *Id.*; *see also* S. Comm. on Env't & Pub. Works, 99th Cong., 2nd Sess., Report 99-1004 to Accompany S. 1128 (1985 Clean Water Act Amendments) (Comm. Print 1985) 3-4. In contrast, the language of Section 316(b) directs EPA to establish requirements for cooling water intake structures that will "minimize adverse environmental impact." Congress deliberately took a different approach in section 316(b) than the approach it adopted for effluent limitations in sections 301 and 304, where the wastewater treatment technology requirements were disconnected from any finding of adverse environmental impact.[7] *See, e.g., E.I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112, 129-30 (1977); *Am. Iron & Steel Inst. v. EPA,* 526 F.2d 1027, 1044 (3rd Cir. 1975), *modified in part on other grounds*, 560 F.2d 589 (3rd Cir. 1977), *cert. denied*, 435 U.S. 914 (1978) (guidelines to be uniform rather than varying with location and nature of receiving water).

[7] In addition to not specifying the factors to be considered in imposing conditions on intake structures, section 316(b) differs as well from CWA provisions that are aimed at controlling wastewater discharges in that it does not contain deadlines for implementation or compliance and does not direct EPA to develop guidelines for implementation with respect to categories of sources. *Cf.* CWA §§ 301(b) and 304(b), 33 U.S.C. §§ 1311(b) and 1314(b).

Moreover, the Clean Water Act requirements for technology-based effluent limitations were expressly intended to move dischargers on a path towards a goal of eliminating pollutant discharges (not just eliminating adverse environmental impacts), and the case law interpreting effluent limitations guidelines that the Second Circuit relied upon is explicitly based in part on the courts' consideration of what interpretation would be consistent with this ultimate goal of eliminating discharges.[8] *See* CWA §§ 101(a)(1) and 301(b)(2)(A), 33 U.S.C. §§ 1251(a)(1) and 1311(b)(2)(A); *Nat'l Crushed Stone*, 449 U.S. at 69-70, 74 (1980); *Natural Res. Def. Council, Inc. v. EPA*, 822 F.2d 104, 123 (D.C. Cir. 1987) (viewing technology-based limitations "[i]n the context of a statute which seeks the elimination of pollution"); *Chem. Mfrs. Ass'n v EPA*, 870 F.2d 177, 250 (5th Cir. 1989), *cert. denied sub nom. PPG Industries, Inc. v. EPA*, 495 U.S. 910 (1990). *See also, e.g., Am. Iron & Steel*, 526 F.2d at 1051-52; *Nat'l Ass'n of Metal Finishers v. EPA*, 719 F.2d 624, 664 (3rd Cir. 1983), *rev'd on other grounds sub nom. Chem. Mfrs. Ass'n v. Natural Res. Def. Council, Inc.*, 470 U.S. 116 (1985). Nowhere in the CWA is there a similar series of increasingly stringent steps leading towards elimination of cooling water intake structures or their effects.

The Second Circuit decision simply ignored these critical distinctions between section 316(b) and sections

[8] The zero discharge goal was intended as "a policy objective. It is not locked in concrete. It is not enforceable." 117 Cong. Rec. 38800 (1971) (remarks of Sen. Muskie), reprinted in 2 A Legis. Hist. of the Water Pollution Control Act Amendments of 1972, 93d Cong., 1st Sess., Senate Comm. on Public Works Serial No. 93-1 (Jan. 1973) ("Legis. Hist.") 1262.

301 and 304. Then the Second Circuit compounded the error by focusing solely on requirements for BAT effluent limitations addressing toxic pollutants (sections 301(b)(2)(A) and 304(b)(2)(B), 33 U.S.C. §§ 1311(b)(2)(A) and 1314(b)(2)(B)), as explained in the following section. Again, the decision ignored clear congressional directives that for other types of limitations EPA must balance costs against effluent reduction benefits—the type of comparison that the Second Circuit says is precluded when EPA establishes cooling water intake structure requirements under section 316(b).

C. Assuming Further that the Most Stringent Criteria for Establishing Effluent Limitations Apply Also to Cooling Water Intakes Is Unjustified.

The Second Circuit's rejection of EPA's interpretation of section 316(b) rests on the lower court's comparison of section 301's Best Practicable Technology ("BPT") level of control, in which EPA is specifically required, through reference to section 304(b), to consider the relationship of costs to benefits, and the BAT level, for which such a cost-benefit balancing is not required.[9] "This shift from BPT to BAT fundamentally altered the way in which the EPA could factor cost into its CWA determinations." Pet. App. 21a.

[9] *See* CWA § 304(b)(2)(B) (effluent reduction benefits not listed as a factor the Administrator "shall take into account"—although "such other factors as the Administrator deems appropriate" is). (In a further leap, the Second Circuit asserts that cost-benefit analysis not only is not required, it is "no longer permitted." Pet App. 23a.)

In the lower court's view, "[t]he shift from the BPT standard to the more stringent BAT one clearly signaled Congress's intent to move cost considerations under the CWA from a cost-benefit analysis to a cost-effectiveness one." *Id.* at 22a.[10]

But in fact, the "shift" from BPT to BAT clearly did not reflect a congressional decision to abandon consideration of benefits for Clean Water Act programs generally after 1984, nor even for effluent limitations generally. As an initial matter, the Second Circuit did not provide sufficient justification for ignoring the criteria for BPT effluent limitations in sections 301 and 304 and focusing solely on BAT. *Cf.* Pet. App. 21a-23a. There is no obvious reason why cross-referencing section 301 would implicate only the criteria for BAT and not those for BPT. For one thing, section 316(b) was included in the 1972 Federal Water Pollution Control Act Amendments, and so for the first 12 years that section 316(b) was in effect the only applicable criteria for establishing effluent guidelines were those for BPT in sections 301(b)(1)(A) and 304(b)(1).[11] If, as the Second Circuit suggests, the cross-reference to section 301 in section 316(b) means that EPA must look to BAT, rather than BPT, for guidance in establishing requirements

[10] The opinion below offers no explanation for its extrapolation from criteria for setting effluent limitations in section 304(b) to "CWA determinations" and "cost considerations under the CWA" generally.

[11] Initially, BAT was to be required as of 1983; the effective date for BAT was changed to 1984 in 1977 amendments to the act. *See* n. 6, *supra.*

under 316(b) because section 316(b) contains the word "available" but not the word "practicable," *see* Pet. App. 31a, then one must also assume that Congress intended, by using those words, that for the first 11-12 years of the CWA cooling water intake structures would be subject to a more stringent performance criterion than wastewater discharges. There is no evidence that Congress intended such an illogical result.

Moreover, the Second Circuit seems to assume that BPT is no longer relevant after 1984, but in fact EPA has continued to establish BPT effluent limitations guidelines, with court approval. *Compare* Pet App. 21a (BAT "replaced" BPT) and 30a (BPT is "obsolete") *with Chem. Mfrs. Ass'n,* 870 F.2d at 206-207 (Best Conventional Technology intended "to supplement, rather than to replace, BPT" for conventional pollutants, and Congress in 1987 enacted "a stricter BPT" that applies to "all BPT regulations for all pollutants" promulgated after 1981). The Second Circuit had no more reason for assuming that the cross-reference in section 316(b) to section 301 incorporated the BAT factors than assuming that the BPT factors under section 301 apply, which "do not require an industrial category to commit the maximum economic resources possible to pollution control, even if affordable."[12]

[12] *See Nat'l Crushed Stone*, 449 U.S. at 75. *See also* Remarks of Rep. Clark during House consideration of Conference Report on S. 2770 (Fed. Water Pollution Control Act Amendments of 1972), 123 Cong. Rec. H9133 (daily ed. Oct. 4, 1972), reprinted in 1 Legis. Hist. 273-74 (section 316 must be read with several other sections of the bill, including "[s]imilar language . . . contained in section 304 concerning factors to be considered in assessing 'best practicable' and 'best available' technology").

Even considering the types of technology-based effluent limitations under section 301 that first began to apply in 1984, however, does not lead to the conclusion that Congress intended that EPA avoid consideration of the benefits to be achieved for Clean Water Act programs generally, or even for effluent limitations. The Second Circuit failed to mention at all Congress' enactment of the Best Conventional Technology ("BCT") level of control for "conventional pollutants," in CWA sections 301(b)(2)(E) and 304(b)(4), 33 U.S.C. §§ 1311(b)(2)(E) and 1314(b)(4). Congress adopted the BCT provisions precisely to avoid the type of "treatment for treatment's sake"—requiring additional technology that is affordable but will not produce significant effluent reduction benefits—that the Second Circuit now claims Congress intended to incorporate by implication into section 316(b). *See Am. Paper Inst. v. EPA*, 660 F.2d 954, 957-58 (4th Cir. 1981); *BP Exploration & Oil, Inc. v EPA*, 66 F.3d 784, 790 (6th Cir. 1995) (Congress recognized that "stringent BAT standards might require unnecessary treatment" of conventional pollutants and "intended for BCT to prevent the implementation of technology for technology's sake"); *Chem. Mfrs. Ass'n*, 870 F.2d at 205 (additional technology may be required only where additional "cheap pounds" of conventional pollutants can be removed). Thus, the Second Circuit's reliance on its assertion that a "shift from BPT to BAT fundamentally altered the way in which the EPA could factor cost into its CWA determinations," Pet App. 21a—without acknowledging that Congress acted directly to *avoid* additional treatment costs *unless* they would produce clear effluent reduction benefits when it enacted BCT—represents an arbitrary focus on one aspect of CWA section 301 and its legislative history, and not another.

Moreover, Congress has acted to avoid requiring additional technology that will not produce significant benefits even in the BAT provisions of the Act. For certain "nonconventional" pollutants (not designated "conventional" pollutants covered by BCT and not listed toxic pollutants), Congress adopted a provision allowing relaxation of requirements based on BAT, to a level (not less than that required by BPT) that will not cause unacceptable water quality in the receiving waters. CWA § 301(g), 33 U.S.C. § 1311(g) (added by § 43 of the Clean Water Act of 1977, Pub. L. 95-27, 91 Stat. 1583); *see Chem. Mfrs. Ass'n v. Natural Res. Def. Council, Inc.*, 470 U.S. 116, 122-23, 127 (1985). Again, Congress acted to avoid unnecessary incremental wastewater treatment technology, because the BPT step had "proven more stringent in many instances than anticipated" and so "will result in a larger measure of progress toward the achievement of the goals of the Act." *See* H.R. Rep. No. 95-830, 95th Cong., 2d Sess. 85 (Dec. 7, 1977), reprinted in 1978 U.S.C.C.A.N. 6668. Again, the Second Circuit failed even to mention this contradiction to its conclusion that Congress has decided to require the most effective technology that a category of discharger can afford, without regard to the incremental benefits or lack thereof from employing that technology.[13]

[13] *Cf. Chem. Mfrs. Ass'n*, 870 F.2d at 196 (in establishing effluent limitations guidelines, "cost factor is accorded less weight . . . for discharges more harmful to the environment").

D. The Second Circuit's Understanding of EPA's Discretion to Consider Costs and Benefits in Setting BAT Effluent Guidelines for Toxic Pollutants Is Flawed.

Even the BAT standard for listed toxic pollutants (for which the adjustment allowed by CWA section 301(g) is not available, *see* CWA section 301(l), 33 U.S.C. § 1311(l)) does not preclude consideration of the costs in comparison to the benefits, as the Second Circuit claims. In fact, in other decisions, the Second Circuit has acknowledged that "cost is only one of the factors that EPA is supposed to consider in establishing BAT standards," and the statute also specifies "that the EPA should consider" "the cost of achieving such effluent reduction" along with a number of other factors, including "such other factors as the Administrator deems appropriate." *Waterkeeper Alliance, Inc. v EPA,* 399 F.3d 486, 516 (2nd Cir. 2005), *quoting* CWA section 304(b)(2)(B). "However, the Clean Water Act 'does not state what weight should be accorded to the relevant factors; rather, the Act gives EPA the discretion to make those determinations.'" *Id.*, *quoting BP Exploration*, 66 F.3d at 802; *accord, Weyerhaeuser Co. v. Costle*, 590 F.2d 1011, 1045 (D. C. Cir. 1978). In fact, the Second Circuit has even suggested in a previous opinion that it would be illogical for EPA *not* to take into account, when establishing requirements under section 316(b), a situation where expensive technology produces relatively little incremental benefit. *Riverkeeper, Inc. v. U.S. EPA*, 358 F.3d 174, 194 n.22 (2nd Cir. 2004) ("*Riverkeeper I*") ("We think it is logical for the EPA to compare the improvements that both dry cooling and closed-cycle cooling offer over once-through

cooling. . . . [I]t is undeniably relevant that [dry cooling] represents a relatively small improvement over closed-cycle cooling at a very significant cost.").

Other courts have also reached the obvious conclusion that the language of sections 301(b)(2)(A) and 304(b)(2)(B) is broad enough to allow EPA to base BAT effluent limitations in part on its assessment of the costs versus the benefits of candidate technologies. "The courts of appeals have consistently held that Congress intended Section 304(b) to give the EPA broad discretion in considering the cost of pollution abatement in relation to its benefits. . . ." *Chem. Mfrs. Ass'n,* 870 F.2d at 204 (citations omitted); *id.* at 207. *See also, e.g., Natural Res. Def. Council, Inc. v. EPA*, 863 F.2d 1420, 1426 (9th Cir. 1988) ("EPA has considerable discretion in weighing the costs of BAT.") (citations omitted). The cases cited by the Second Circuit, and indeed most if not all of the decisions addressing the issue, have said that EPA is not required to do a cost-benefit balancing for BAT, but not that EPA is precluded from doing so. *See, e.g., Rybachek v. EPA*, 904 F.2d 1276, 1290-91 (9th Cir. 1990) (". . . EPA must consider the 'cost' of meeting BAT limitations, but *need not* compare such cost with the benefits of effluent reduction. . . . The Agency measures costs on a 'reasonableness standard'; it has considerable discretion in weighing the technology's costs...") (emphasis added, citations omitted); *Am. Petroleum Inst. v. EPA*, 787 F.2d 965, 972 (5th Cir. 1986); *Our Children's Earth Found. v. U.S. EPA*, 527 F.3d 842, 849 n.5 (9th Cir. 2008) (EPA has "discretion" to consider other factors, "including harm or risk-based factors").

The Second Circuit's analysis does not even make sense on its face: The Second Circuit views EPA's proper role is determining whether the cost of wastewater treatment technology—and therefore also the cost of a candidate cooling water intake technology—"could not be reasonably borne by the industry." Pet App. 33a; *see also id.* at 24a-26a. Yet the question of whether a cost is "reasonable" cannot be resolved in a vacuum. Whether it is reasonable to buy an automobile for $50,000 may depend on a number of things in addition to whether one has more than $50,000 in the bank; certainly a key consideration is what you are getting for the money—a 10-year-old minivan or a new luxury sports car?—and how it compares to what you could buy for less money.[14] The Second Circuit's notion that an industry can "reasonably bear" the costs of additional technology so long as a significant portion of the industry will not be forced out of business is not "reasonable" at all.[15] Nor is it a sensible description of the "best"

[14] The Second Circuit recognized this in *Riverkeeper I*, 358 F.3d at 194 n. 22 ("when noting how much more expensive dry cooling is than closed-cycle cooling, it is only fair to note how much more effective it is as well....[I]t is undeniably relevant that that difference represents a relatively small improvement over closed-cycle cooling at a very significant cost.").

[15] *See* Pet. App. 27a-28a (equating "economically feasible" with "reasonable"). *Cf. Am. Petroleum Inst.*, 787 F.2d at 972-73 (implying it would not be "reasonable" for EPA to "tilt at windmills by imposing BAT limitations which removed de minimis amounts of polluting agents from our nation's waters, while imposing possibly disabling costs upon the regulated industry.").

technology for minimizing adverse environmental impact.[16]

The only example the Second Circuit offers of when the Clean Water Act would allow EPA to consider costs and benefits in establishing requirements for wastewater discharges under section 301 or cooling water intake structures under section 316(b) is nonsensical: If there are two or more economically feasible technologies "that produce essentially the same benefits but have markedly different costs," EPA may "choose a less expensive technology that achieves essentially the same results as the benchmark."[17] But EPA promulgates effluent limitations or other permit conditions, based on what the available technology or technologies it identifies can achieve, rather than mandating that a facility install any particular technology. *See, e.g.*, *Rybachek*, 904 F.2d at 1298; *Natural Res. Def. Council*, 822 F.2d at 122-23. Thus, if

[16] The Second Circuit's view that a technology option is "best," even if it results in only a slight improvement in environmental performance at far higher costs, not only is *not* the only "permissible" reading of the statutory language, it is not even a facially reasonable one. *See BP Exploration*, 66 F.3d at 796 ("[T]he CWA's requirement that EPA choose the 'best' technology does not mean that the chosen technology must be the best pollutant removal. Obviously, BAT . . . must be acceptable on the basis of numerous factors, only one of which is pollution control.")

[17] Pet. App. 26a-28a. *See also id.* at 23a ("cost-effectiveness considerations, like BAT, determine which means will be used to reach a specified level of benefit that has already been established." (footnote omitted)).

EPA, when developing BAT effluent requirements or BTA cooling water intake structure requirements, "chooses," as the identified technology basis for the rule, a less-expensive technology that achieves the same result, that would not make any difference in the wastewater discharge limitations or cooling water intake structure permit conditions that the permitted facility would be required to meet.

This "cost-effectiveness analysis" that the Second Circuit concluded EPA may engage in, Pet. App. 26a-28a, not only is essentially meaningless as the Second Circuit described it, it is vague and undefined. Although the Second Circuit says its test is completely different from a "cost-benefit analysis" that EPA performs in setting BPT effluent limitations, *id.* 24a-26a, 29a, EPA and other courts have used "cost-effectiveness" analysis to denote such a comparison of costs and benefits used in setting BPT, as well as the analysis used in setting BCT limits.[18] By substituting EPA broad discretion to weigh costs and benefits with an unclear standard that uses the term "cost-effectiveness" differently from how it has been used by EPA and other courts, the Second Circuit is inviting yet more litigation about how EPA may go about setting not only cooling water intake structure requirements, but effluent limitations as well.

[18] *See, e.g., Am. Iron & Steel Inst. v. EPA*, 568 F.2d 284, 297 (3rd Cir. 1977); *Chem. Mfrs. Ass'n*, 870 F.2d at 206; *Am. Petroleum Inst.*, 540 F.2d 1023, 1037-38 (10th Cir. 1976), *cert. denied*, 430 U.S. 922 (1977) (EPA refers to its analysis for setting BPT limitations as a "cost-effectiveness analysis"); *cf. Ass'n of Pac. Fisheries v. EPA*, 615 F.2d 794, 809 (9th Cir. 1980) (BPT balancing of costs and benefits considers both improved water quality and "amount of pollutants discharged").

III. The Second Circuit's Restrictive Interpretation of CWA Section 301, if Not Corrected by the Court, Could Have Significant Adverse Effects Beyond Regulation of Cooling Water Intake Structures.

Because the Second Circuit turned to section 301 for "guidance" as to the factors Congress intended EPA to consider in developing requirements for cooling water intake structures under section 316(b), the decision below provides the Second Circuit's interpretation of how costs and benefits may be considered in the establishment of requirements for wastewater discharges under section 301 (through "effluent limitations guidelines"). In so doing, the Second Circuit rejected EPA's interpretation of the statute, and that of other Circuits as well, to find that EPA has only very limited discretion to consider how the costs of wastewater treatment technology relate to incremental reductions in pollutant discharges. *See* Pet. App. 20a-23a.

Because the Second Circuit offered this interpretation of CWA section 301 in the context of determining what factors EPA may consider in assessing best technology available for minimizing adverse environmental impact under CWA section 316(b), rather than in reviewing any effluent limitations imposed by EPA or state authorities under CWA section 301, the decision below may not technically be binding on EPA or state authorities issuing such effluent limitations. Nevertheless, respondents and other advocacy groups likely will claim that the decision below is binding precedent on the extent to which costs and benefits may be taken into account when establishing effluent

limitations, and EPA also might choose to follow the unequivocal language of the Second Circuit's interpretation of section 301.

EPA has already applied section 301 in issuing effluent limitations guidelines under CWA section 304(b), 33 U.S.C. § 1314(b), for dozens of categories of discharges covering a large swath of industrial and commercial activities. *See* 40 C.F.R. pts. 405-471 (2007). The Second Circuit's incorrect view of section 301 could nevertheless have substantial adverse effects on businesses in the future, in a number of ways. EPA is required to consider, "at least annually," whether it is appropriate to revise its effluent limitations guidelines regulations. CWA § 304(b); § 304(m)(1)(A), 33 U.S.C. § 1314(m)(1)(A); *see also* § 301(d), 33 U.S.C. § 1311(d) (review and, if appropriate, revision of effluent limitations every five years). Additionally, EPA must identify and develop effluent limitations guidelines for additional categories of sources which the EPA Administrator determines have non-trivial discharges of toxic or nonconventional pollutants. CWA § 304(m)(1)(B)-(C), 33 U.S.C. § 1314(m)(1)(B)-(C); *Our Children's Earth*, 527 F.3d at 848-52. Moreover, individual wastewater discharge permits may impose case-by-case, best professional judgment effluent limitations implementing section 301 when they are issued or renewed. *See* CWA § 402(a)(1), 33 U.S.C. § 1342(a)(1); 40 C.F.R. § 125.3(a)(2), (c)(2) (2007).

Past experience has shown that it is not unusual for determinations of available technology under section 301 to involve selection among technologies with vastly different, and huge, costs, but little difference in results.

For example, in developing BAT effluent limitations guidelines for bleached pulp and paper mills, EPA considered but ultimately rejected a technology option that cost twice as much—about *a billion dollars more*—while providing only a slight improvement in toxic pollutant discharges and no difference in monetized water quality benefits. *See Nat'l Wildlife Fed'n v. EPA*, 286 F.3d 554, 559 (D.C. Cir. 2002); 63 Fed. Reg. 18,503, 18,551, 18,544-45 (April 15, 1998). In considering BAT effluent limitations for offshore oil drilling platforms, EPA relied on several considerations to reject (with the Sixth Circuit's approval) a wastewater reduction technology that, while probably technically available and economically achievable, would have imposed *over six billion dollars* of additional costs. *See BP Exploration*, 66 F.3d at 796-97. In setting wastewater limits for cattle feedlots, EPA considered an approach that would have caused almost *six times as many* of those facilities to shut down than the case-by-case regulation EPA ultimately chose, but would have produced only about one percent more reduction in nitrogen loading. *Waterkeeper Alliance,* 399 F.3d at 515. As technology inevitably progresses, and there are smaller and smaller remaining amounts of pollutants to be treated, the potential for high-cost treatment technologies that produce little benefit will be even greater in the future.[19]

[19] *See, e.g., Ass'n of Pac. Fisheries*, 615 F.2d at 818 (acknowledging that "at some point, extremely costly more refined treatment will have a de minimis effect on the receiving waters"); *Chem. Mfrs. Ass'n*, 870 F.2d at 205 (discussing "point at which costs escalate rapidly in relation to benefits"), 207 (EPA has discretion to select "the point of diminishing returns"). *See also Nat'l Ass'n of Metal Finishers,* 719 F.2d at 664 (industry says setting electroplating BPT effluent guidelines just five percent higher would cut compliance costs in half).

The Second Circuit's erroneous interpretation of CWA section 301 therefore has the potential to affect many more facilities than just those that have cooling water intake structures. The potential large adverse financial impact on businesses and, ultimately, the American public if the Second Circuit's restrictive reading of section 301 is applied in developing effluent limitations for wastewater discharges makes it all the more important that the Court correct that erroneous statutory interpretation.

CONCLUSION

For the reasons set forth above, *amici curiae* urge the Court to reverse the decision of the Second Circuit and find that EPA has the discretion to weigh the costs and the pollution reduction or environmental benefits achieved, when considering technology options as the basis for effluent limitations under CWA section 301(b) and cooling water intake structure requirements under CWA section 316(b).

Respectfully submitted,

RUSSELL S. FRYE
Counsel of Record
FRYELAW PLLC
1101 30th Street, N.W. Suite 220
Washington, DC 20007-3769
(202) 572-8267

Counsel for Amici Curiae American Chemistry Council, American Forest & Paper Association, American Iron and Steel Institute, Chamber of Commerce of the United States of America, and National Association of Manufacturers

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Of Counsel:

LESLIE A. HULSE
Assistant General Counsel
American Chemistry Council
1300 Wilson Boulevard
Arlington, VA 22209

RICHARD S. WASSERSTROM
American Forest & Paper Association
1111 19th Street, N.W., Suite 800
Washington, DC 20036

ROBIN S. CONRAD
AMAR D. SARWAL
National Chamber Litigation Center, Inc.
1615 H Street, N.W.
Washington, DC 20062

JAN S. AMUNDSON
Senior Vice President & General Counsel
QUENTIN RIEGEL
Vice President, Litigation & Deputy General Counsel
National Association of Manufacturers
1331 Pennsylvania Avenue, N.W.
Washington, DC 20004-1790